A

Izmeer Aizat bin Idrusam v Public Prosecutor

B HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO BA-42S-3–01 OF 2018
AHMAD FAIRUZ JC
28 DECEMBER 2018

C *Criminal Law — Offences — Robbery — Trial judge ordered discharge not amounting to acquittal — Appeal — Appellant appealed for order of acquittal and discharge — Whether order of discharge not amounting to acquittal appealable — Whether judge entitled to interfere with prosecutorial discretion — Whether there was affirmative action taken by prosecutor — Whether withdrawal of first information report entitled appellant to order of acquit and discharge — Whether court entitled to give order of discharge not amounting to acquittal — Whether charge would be hanging over the accused — Criminal Procedure Code s 254 — Penal Code s 392*

D

E The appellant was charged at the Selayang Sessions Court for an offence of robbery under s 392 of the Penal Code. On the first day of trial, the deputy public prosecutor ('the DPP') called the complainant to the stand and she informed the court that she had made a police report to withdraw the first information report ('the FIR') that she made vide Selayang Report 3090/17. The sessions court judge ('the trial judge') then ordered a discharge not amounting to an acquittal ('the DNAA order'). Dissatisfied with the order, the appellant appealed to the present court sought that the order of the trial judge was set aside and substituted with an order of acquittal and discharge ('the AND order'). Before the present court, counsel for the appellant argued that the trial judge had erred when she ordered the DNAA order. It was contended that the appropriate order should be the AND order. The main argument was the fact that the case of the prosecution collapsed when the complainant no longer interested in pursuing the matter. The issues to be determined were: (a) whether the DNAA order was appealable; (b) whether the trial judge entitled to interfere with prosecutorial discretion; (c) whether there was an affirmative action taken by the DPP; (d) whether the withdrawal of first information report entitled the accused to get the AND order; (e) whether the court was entitled to give the DNAA order to the accused; and (f) whether the charge would be hanging over the accused.

F

G

H

I

Held, dismissing the appeal and affirming the order of the sessions court judge:

(1) On the issue of whether the DNAA order was appealable, what was appealable was only against a final order of a court. It was only when the

rights of the parties were finally disposed would an order appealable. The present court was bound by the decision of the Court of Appeal in the case of *Tan Chow Cheang v Public Prosecutor* [2018] 5 MLJ 411. The present appeal was therefore premature and was not properly laid before the present court. There was no final order to be appealed against by the appellant (see paras 10 & 14).

(2) While the trial judge had vast powers to deal with the matter butit had to be exercised carefully. It was trite that the power to institute, conduct and discontinue a criminal action was solely the prerogative of the public prosecutor. The courts had no right to interfere with the prosecutorial discretion bestowed on the public prosecutor by the Federal Constitution (see para 16).

(3) Under s 254 of the Criminal Procedure Code ('the CPC'), there was an affirmative action required from the public prosecutor ('the PP') or DPP. It mandated the PP or the DPP to notify and inform the court of the stand it was taking. In the present case, there was no affirmative submission by the DPP that he did not wish to proceed with the matter. Therefore, the DPP was merely leaving the decision to the court as to the appropriate order to be made in light of the circumstances of the case (see para 25).

(4) The withdrawal of a FIR did not allow the trial judge to automatically acquit and discharge an accused person. If such a stand was taken, it was a backdoor method to discontinue a prosecution. It was grossly simplistic to accept the submission by counsel that there was no longer any basis for a prosecution to proceed given that the complainant was no longer interested with the matter (see paras 27 & 32).

(5) In the scenario where there was no express application by the DPP to seek a discharge of the accused, the court was not wrong in deciding to order a DNAA. The court could not be dictated by the whims and fancies of a complainant. The court too was not obliged to order an outcome that the appellant desired (see para 36).

(6) As to whether the charge would be hanging over the accused, this was solely within the discretion and wisdom of the public prosecutor. While it was acknowledged that in general, there was no limitation period in instituting a criminal case, it was also acknowledged that the longer a case was kept before an accused was prosecuted, the greater were the chances of the case weakening. The court was of the considered view that it would not play a role in so deciding the present issue as the matter was solely within the realm of the public prosecutor's discretion. The magistrate did not err in making an order of DNAA. It was done within the confines of the law and more so in the situation that the court was confronted with (see paras 38 & 42).

[Bahasa Malaysia summary

Perayu dituduh di Mahkamah Sesyen Selayang atas kesalahan rompakan di bawah s 392 Kanun Keseksaan. Pada hari pertama perbicaraan, timbalan pendakwa raya ('DPP') memanggil pengadu ke kandang dan memberitahu mahkamah bahawa dia telah membuat laporan polis untuk menarik balik laporan maklumat pertama ('FIR') yang dibuatnya vide Selayang Report 3090/17. Hakim bicara mahkamah sesyen ('hakim bicara') kemudian memerintahkan pelepasan tidak terjumlah kepada pembebasan ('perintah DNAA'). Tidak berpuas hati dengan perintah tersebut, perayu merayu kepada mahkamah ini memohon bahawa perintah hakim bicara itu diketepikan dan diganti dengan perintah pembebasan dan pelepasan ('perintah AND'). Di hadapan mahkamah ini, peguam untuk perayu berpendapat bahawa hakim bicara telah terkhilaf ketika beliau memberi perintah DNAA. Adalah dinyatakan bahawa perintah yang sesuai sepatutnya perintah AND. Hujah utama adalah hakikat bahawa kes pendakwaan gagal apabila pengadu tidak lagi berminat dalam meneruskan perkara itu. Isu-isu yang perlu ditentukan adalah: (a) sama ada perintah DNAA boleh dirayu; (b) sama ada hakim bicara berhak mengganggu budi bicara pendakwaan; (c) sama ada terdapat tindakan afirmatif yang diambil oleh DPP; (d) sama ada penarikan laporan maklumat pertama memberi hak kepada tertuduh untuk mendapatkan perintah AND; (e) sama ada mahkamah berhak untuk memberikan perintah DNAA kepada tertuduh; dan (f) sama ada pertuduhan itu akan tergantung di atas tertuduh.

Diputuskan, menolak rayuan dan mengesahkan perintah hakim mahkamah sesyen:

(1) Mengenai isu sama ada perintah DNAA boleh dirayu, apa yang boleh dirayu hanyalah terhadap perintah akhir mahkamah. Ia hanya apabila hak pihak-pihak akhirnya dilupuskan akan perintah boleh dirayu. Mahkamah ini terikat dengan keputusan Mahkamah Rayuan dalam kes *Tan Chow Cheang v Pendakwa Raya* [2018] 5 MLJ 411. Oleh itu, rayuan ini adalah pramatang dan tidak dibentangkan dengan betul di hadapan mahkamah ini. Tiada perintah akhir untuk dirayu oleh perayu (lihat perenggan 10 & 14).

(2) Walaupun hakim bicara mempunyai kuasa yang luas untuk menangani perkara tetapi ia harus dilaksanakan dengan teliti. Adalah jelas bahawa kuasa untuk memulakan, menjalankan dan menghentikan tindakan jenayah adalah semata-mata prerogatif pendakwa raya. Mahkamah tidak berhak mengganggu budi bicara pendakwaan yang diberikan kepada pendakwa raya oleh Perlembagaan Persekutuan (lihat perenggan 16).

(3) Di bawah s 254 Kanun Tatacara Jenayah ('KTJ'), terdapat tindakan afirmatif yang diperlukan daripada pendakwa raya ('PP') atau DPP. Ia memberi mandat kepada PP atau DPP untuk memberitahu dan memaklumkan kepada mahkamah tentang pendirian yang sedang

diambilnya. Dalam kes ini, tiada penyerahan afirmatif oleh DPP bahawa beliau tidak mahu meneruskan perkara itu. Oleh itu, DPP hanya menyerahkan keputusan kepada mahkamah tentang perintah yang sesuai yang dibuat berdasarkan keadaan kes itu (lihat perenggan 25).

(4) Penarikan balik FIR tidak membenarkan hakim bicara untuk secara automatik membebaskan dan melepaskan seseorang tertuduh. Jika pendirian sedemikian diambil, ia adalah kaedah pintu belakang untuk menghentikan pendakwaan. Adalah sangat mudah untuk menerima hujahan oleh peguam bahawa tidak ada lagi asas bagi pendakwaan untuk meneruskan memandangkan pengadu tidak lagi berminat dengan perkara tersebut (lihat perenggan 27 & 32).

(5) Dalam senario di mana tiada permohonan nyata oleh DPP untuk mendapatkan pelepasan tertuduh, mahkamah tidak salah dalam memutuskan untuk memerintahkan DNAA. Mahkamah tidak dapat ditentukan oleh keinginan dan kemahuan pengadu. Mahkamah juga tidak diwajibkan untuk memerintahkan keputusan yang dipohon oleh perayu (lihat perenggan 36).

(6) Sama ada pertuduhan itu akan tergantung di atas tertuduh, ini hanya mengikut budi bicara dan kebijaksanaan pendakwa raya. Walaupun diakui bahawa pada amnya, tiada tempoh had masa dalam memulakan kes jenayah, ia juga diakui bahawa semakin lama kes telah disimpan sebelum tertuduh dituntut, semakin besar kemungkinan terjadinya kelemahan kes. Mahkamah berpendapat bahawa ia tidak akan memainkan peranan dalam menentukan keputusan isu sekarang kerana perkara itu hanya dalam budi bicara pendakwa raya. Majistret tidak terkhilaf dalam membuat perintah DNAA. Ia dilakukan dalam lingkungan undang-undang dan terutamanya dalam situasi yang mahkamah telah dihadapkan (lihat perenggan 38 & 42).]

Notes

For a case on robbery, see 4(2) *Mallal's Digest* (5th Ed, 2018 Reissue) para 2130.

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321, CA (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544; [1991] 1 CLJ Rep 183, SC (refd)
Koh Teck Chai v PP [1968] 1 MLJ 166 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)
PP v Au Seh Chun [1998] 6 MLJ 179; [1998] 3 CLJ Supp 56, HC (refd)
PP v Azril Nurrasyid b Mohamed Jomali [2009] MLJU 1298, HC (refd)
PP v Hettiarachigae LS Perera [1977] 1 MLJ 12 (refd)

PP v Lau Ngiik Yin [2007] MLJU 668, HC (refd)
PP v Lew Koy [2001] 4 MLJ 655; [2002] 1 CLJ 86, HC (refd)
PP v Syed Abdul Bahari Shahabuddin [1976] 1 MLJ 87 (refd)
PP v Z [1995] MLJU 474; [1995] 4 CLJ 383, HC (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100; [1986] CLJ Rep 232, SC (refd)
PP v Zalili bt Mustapha [2010] 1 MLJ 666, HC (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Tan Chow Cheang v PP [2018] 5 MLJ 411, CA (folld)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)

Legislation referred to

Criminal Procedure Code ss 107, 173(g), 254, 254(3), 254A, 376(3)
Dangerous Drugs Act 1952 s 39B(1)(a)
Federal Constitution art 145(3)
Penal Code s 392

Balvinder Singh (Shahrul Balvinder & Co) for the appellant.
Noor Husnita Mohd Radzi (Deputy Public Prosecutor, Selangor State Legal Advisor's Office) for the respondent.

Ahmad Fairuz JC:

INTRODUCTION

[1] The appellant was charged at the Selayang sessions court for an offence of robbery under s 392 of the Penal Code. On the first day of trial, the deputy public prosecutor ('DPP') called the complainant to the stand and she informed the court that she had made a police report to withdraw the first information report ('FIR') that she made vide Selayang Report 3090/17. The sessions court judge ('SCJ') then ordered a discharge not amounting to an acquittal ('DNAA').

[2] Being dissatisfied with the order, the appellant appealed to this court seeking that the order of the SCJ be set aside and substituted with an order of acquittal and discharge ('AND'). This court dismissed the appeal and affirmed the order of the SCJ.

[3] This court entertained this appeal on the basis that there were specific issues of law that needed to be answered. An order of DNAA does not finally dispose the rights of and the individual, more so, with the introduction of s 254A of the Criminal Procedure Code.

[4] The appellant being dissatisfied with the decision, appeals to the Court of Appeal. This is the grounds of judgment of this court.

THE CHARGE

[5] The charge is as follows:

> Bahawa kamu pada 9.2.2017 jam lebih kurang 7.00 pagi bertempat di Simpang D'Maju One Siara di dalam Daerah Gombak dalam Negeri Selangor dengan mencapai niat telah melakukan rompakan ke atas *Kavimani a/p Muthayam, K/P: 710826-10-6036* iaitu kad pengenalan, lesen memandu, kad ATM (Hong Leong Bank, Public Bank dan Maybank), kredit kad Maybank, iPhone 6+, iPhone 5, matawang USD 100, wang tunai lebih kurang RM 300.00 dan kunci m/kar BMW kerugian RM5,000.00. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 392 Kanun Keseksaan.
>
> *Hukuman*: Disabit kesalahan hendaklah diseksa dengan penjara selama tempoh yang boleh sampai empat belas tahun dan bolehlah juga dikenakan denda atau sebat.

THE PROCEEDINGS AT THE SESSIONS COURT

[6] The relevant notes of evidence from the appeal records showed as follows:

> SP1 angkat sumpah dan memberikan keterangan dalam bahasa Malaysia.
>
> Nama: *Kavimani a/p Muthayam*
>
> No K/P: 710826-10-6036
>
> Umur: 46 tahun
>
> Alamat: No. 2A Jalan 053, One Sierra
>
> 68100 Batu Caves, Selangor.
>
> *Pemeriksaan Utama SP1*
>
> Pada 9.2.2017 puan ada membuat laporan polis mengatakan puan telah disamun?
>
> Benar.
>
> (Laporan polis Selayang/003090/17 dirujuk kepada SP1)
>
> Adakah ini report yang puan buat?
>
> Benar.
>
> P1 — Laporan Polis Selayang/003090/17.
>
> Pada 18.11.2017 puan ada buat satu laporan tarik balik?
>
> Betul.
>
> (Selayang Rpt 026821/17 dirujuk kepada SP1).
>
> Adakah ini laporan tarik balik yang puan buat?
>
> Benar.

P2 — Laporan Polis Selayang/026801/17.

Ada orang ugut atau paksa puan buat laporan tarik balik ini?

Tidak.

Adakah buat dengan kerelaan hati puan sendiri?

Ya.

Pemeriksaan Balas SP1

Peguambela:

Tiada soalan.

The defence apologise for any inconvenience caused to her.

Mah:

SP1 dilepaskan.

TPR:

Serah kepada budi bicara Mahkamah.

Mah:

OKT dilepaskan tanpa dibebaskan daripada pertuduhan (Kes DNAA).

Wang jaminan dikembalikan.

THE LAW

[7] The discussion of this appeal will revolve around the provision of s 254 of the Criminal Procedure Code ('the CPC'). It reads as follows:

Section 254 Public Prosecutor may decline to prosecute further at any stage

(1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.

(2) At any stage of any trial before a Sessions Court or a Magistrates Court before the deliver of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge of and from the same.

(3) Such discharge shall not amount to an acquittal unless the Court so directs.

THE APPEAL

[8] Before this court, counsel for the appellant argued that the SCJ had erred when she ordered an order of DNAA. It was contended that the appropriate order should have been AND. The main argument being the fact that the case of the prosecution collapses when the complainant no longer is interested in pursuing the matter. There was no basis for a prosecution to continue. It was also argued that given that the prosecution could not give a time frame of when the matter can proceed in the future warranted an order of AND to be given. The implication of an order of DNAA will prejudice the appellant as there will forever be a charge 'hanging over his head'. Given the age and bright future of the appellant going forward, it became even more crucial for the order to be one of AND so that the matter is put to rest.

[9] The learned DPP on the other hand, argued that this was not an application under s 254 of the CPC. It was purely an exercise of s 173(g) of the CPC. Therefore it was an exercise of discretion that was in play.

WHETHER AN ORDER OF DNAA IS APPEALABLE

[10] At the onset of this judgement, it is apposite for this court to raise the issue of whether an order of DNAA is appealable. The position in law on this issue is clear. What is appealable is only against a final order of a court. It is only when the rights of the parties are finally disposed will an order be appealable (see *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129; *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321).

[11] The Court of Appeal in *Tan Chow Cheang v Public Prosecutor* [2018] 5 MLJ 411 was confronted with this issue. The appellant was charged in the High Court for trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. On 17 September 2015, the defence suddenly produced a CCTV recording and applied for it to be viewed by the court as it was their case that the drug was planted. The prosecution was caught by surprise and the case was therefore adjourned. After several adjournments, the CCTV recording was viewed through a pendrive and the pendrive was marked as IDD27 despite the prosecution's objection. The prosecution then made an application under s 254(3) of the Criminal Procedure Code ('the CPC') to discharge the appellant not amounting to an acquittal ('the DNAA') pending the forensic report of the CCTV recording. The defence strongly objected to the DNAA and submitted that the appellant was entitled to be acquitted and discharged as upon the production of the CCTV recording, the sole or main prop in the prosecution's case collapsed prematurely. The High Court judge agreed with the prosecution's request and ordered the appellant to be DNAA.

[12] The Court of Appeal held that the appeal was premature. With the introduction of s 254A of the CPC, it allows the prosecution to continue with the prosecution for the same offence as if there was no order of discharge made. As such, the matter was dismissed and the High Court decision to order a DNAA was affirmed by the Court of Appeal.

[13] For ease of reference, s 254A reads as follows:

> Section 254A Reinstatement of trial after discharge
>
> (1) Subject to subsection (2), where an accused has been given a discharge by the court and he is recharged for the same offence, his trial shall be reinstated and be continued as if there had been no such order given.
>
> (2) Subsection (1) shall only apply where witnesses have been called to give evidence at the trial before the order for a discharge has been given by the court.

[14] It is in the same vein that this court is of the considered view that this court is bound by the decision of the Court of Appeal in *Tan Chow Cheang*. This appeal is therefore premature and is not properly laid before this court. There is no final order to be appealed against by the appellant.

[15] Be that as it may, given that there are points of law that merits a discussion, this court is of the view that it was appropriate for the issues to be addressed by this court.

ANALYSIS ON THE MERITS OF THE APPEAL

[16] While the SCJ has vast powers to deal with the matter, this court is of the view that it has to be exercised carefully. It is trite that the power to institute, conduct and discontinue a criminal action is solely the prerogative of the public prosecutor. Cases such as *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 (FC); *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 (PC); *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; [1991] 1 CLJ Rep 183 were clear in holding that the power to institute, conduct or discontinue any criminal proceedings lies solely with the public prosecutor. The courts have no right to interfere with the prosecutorial discretion bestowed on the public prosecutor by the Constitution. Article 145(3) of the Federal Constitution is the supreme law that outlines this power.

[17] In *Public Prosecutor v Hettiarachigae LS Perera* [1977] 1 MLJ 12, Harun J (as he then was) held:

> according to article 145 of the Federal Constitution only the Attorney-General has the power to institute, conduct or discontinue any proceedings for an offence. Until he makes up his mind the courts have to wait. Magistrates therefore have no

business to usurp the functions of the Attorney-General. A

Orders open to the SCJ

[18] *Public Prosecutor v Zalili bt Mustapha* [2010] 1 MLJ 666, the High Court provided a summary of when an order of DNAA can be made by a court. It held as follows: B

> In fact the law governing an order of discharge not amounting to an acquittal is clear. In a summary trial, a magistrate may order a discharge not amounting to an acquittal under three circumstances under the Criminal Procedure Code namely: C
>
> (a) When the public prosecutor declines to prosecute further at any stage before delivery of judgment under s 254 of the CPC. Section 254 of the CPC provides that where the public prosecutor declines to further prosecute an accused person upon the charge, all proceedings on such charge shall be stayed. The accused shall be discharged and such discharge shall not amount to an acquittal unless the court so directs. D
>
> In determining whether to grant an acquittal or discharge not amounting to an acquittal under s 254 of the CPC, the court must take into consideration all the relevant facts and factors placed before it including the intention of the public prosecutor as to the future prosecution of the accused on the charge (*Goh Cheng Chuan v Public Prosecutor* [1990] 3 MLJ 401). E
>
> Thus, where the prosecuting officer informs the court that he does not propose further to prosecute the accused person on the charge and applies to the court to stay the proceedings under s 254 of the CPC on the ground that he cannot proceed with the case now as his witnesses are overseas and their dates of return unknown, the court would be justified in making an order of discharge not amounting to an acquittal (*Public Prosecutor v David Noordin* [1980] 2 MLJ 146). F
>
> But the court may acquit and discharge the accused where the public prosecutor informs the court that he will not ever prosecute the accused on the charge (*K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor* [1985] 1 MLJ 193; see also *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166; *Seet Ah Ann v Public Prosecutor* [1950] MLJ 293). G
>
> Whether or not a discharge shall amount to an acquittal depends on the circumstances of each case. The court in so deciding must bear in mind the public interest and right of the individual not to be saddled with a charge in which proceedings are stayed for an indeterminate period (see *K Abdul Rasheed*'s case). H
>
> But the magistrates must take note that s 254 of the CPC will come into operation only if the prosecuting officer has made a decision not to prosecute the accused further. I
>
> (b) When the complainant is absent on the day fixed for hearing in a private prosecution initiated under s 133 of the CPC: s 173(m).

A This paragraph is applicable to a case upon complaint initiated under s 133 of the CPC. If a magistrate is satisfied that the complainant is absent with no sufficient reasons, he may discharge the accused provided that the offence is compoundable. The discharge does not however amount to an acquittal.

B (c) here the charge is groundless under s 173(g) of the CPC

Section 173(g) empowers the court to discharge an accused person and not to acquit him (*Chu Chee Peng v Public Prosecutor (as we go to press we learn that an appeal against this decision has been lodged to the Privy Council ed MLJ)* [1973] 2 MLJ 35 (FC)). In order to invoke s 173(g) of the CPC, a magistrate must be C satisfied that the requirements laid down under para (g) have been complied with:

(i) an order of discharge not amounting to an acquittal can only be made under this paragraph if the court considers the charge to be groundless.

D **[19]** In the High Court decisions of *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166 and *Public Prosecutor v Syed Abdul Bahari Shahabuddin* [1976] 1 MLJ 87, the position taken was that a court must order an acquittal and discharge upon being notified by the prosecution.

E **[20]** In *Koh Teck Chai*, it was held:

Held: the power enabling the discharge of the accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently F demands that it be used. Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. In the circumstances of this case the order of the learned magistrate should be varied so that the discharge should amount to an acquittal.

G **[21]** In *Syed Abdul Bahari*, wherein it was, inter alia, held:

Held: (1) unless there are good grounds to the contrary a discharge under s 254 of the Criminal Procedure Code should amount to an acquittal. Good grounds would arise where the prosecution is unable to proceed for the time being but can satisfy H the court that the temporary impediment is not insurmountable and that it will proceed within a reasonable time.

[22] In *Public Prosecutor v Au Seh Chun* [1998] 6 MLJ 179; [1998] 3 CLJ Supp 56 Suriyadi J (then FCJ), although ruling that the magistrate was wrong I to order acquittal and discharge and went on to reinstate the case, His Lordship made the following observation with regards to s 254 where it was held as follows:

Under this provision, such discharge shall not amount to an acquittal unless the court so directs. In other words, for him to be recorded to have been acquitted, must be pursuant to the pro-active act of the learned magistrate who must so specify the details. *Notwithstanding this supposed room given to the magistrate, it is quite established that whenever the prosecution has indicated to the court that it is not interested in pursuing the matter, the court then shall acquit the accused*. (Emphasis added.)

[23] In *Public Prosecutor v Lau Ngiik Yin* [2007] MLJU 668 Hamid Sultan bin Abu Backer JC (now JCA) discussed at length the appropriate scenarios of when an order of Acquittal and discharge can be made. His Lordship, inter alia, held as follows:

In my view the court must order an acquittal and not DNAA, *when the prosecutor has shown disinterestedness in prosecuting the case or the prosecution is not able to prosecute the case for good reasons and it is unlikely the case can be prosecuted expeditiously in the short future. This is so because the liberty of His Majesty's subject cannot be placed by a continuous threat of prosecution by only an order of discharge. Such an order may be against constitutional guarantees.* (Emphasis added.)

[24] In *Public Prosecutor v Z* [1995] MLJU 474; [1995] 4 CLJ 383, Mohd Hishamudin J (then JCA) extrapolated s 254 of the CPC as follows:

It is important to note the difference between subsection (1) and subsection (2). The former refers to the Public Prosecutor whilst the latter refers to a prosecuting officer. It will be observed that in subsection (1) *it is provided that the Public Prosecutor may inform the court 'he will not further prosecute the accused' whereas in subsection (2) it is provided that the prosecuting officer may inform the court that he 'does not propose further to prosecute the accused'. It will also be observed that the effect on the court on being so informed is different between the two subsections*. In subsection (1), the effect is that the court shall stay all proceedings and the accused shall be discharged. There is, therefore, no discretion on the part of the court; whereas, subsection (2) merely provides that 'all proceedings on such charge against the accused may be stayed by leave of the court and, if not stayed, the accused shall be discharged' ... (Emphasis added.)

[25] From a reading of the above cases, what is clear to this court is the fact that under s 254 of the CPC, there is an affirmative action required from the PP or DPP. It mandates the PP or DPP to notify and inform the court of the stand it was taking. Upon reading the appeal records, this court was unable to find any affirmative submission by the DPP that he does not wish to proceed with the matter. Therefore, the DPP was merely leaving the decision to the court as to the appropriate order to be made in light of the circumstances of the case.

Whether a withdrawal of a first information report ipso facto discontinues a criminal action/demolishes the foundation of a case

[26] From the argument of counsel for the applicant, it seems to suggest that the FIR is the all-important document and it is a reflection of the stand taken by the victim/complainant who is no longer interested in pursuing the case. It was argued that the case of the prosecution no longer has the basis to exist.

[27] This court is of the considered view that the withdrawal of a FIR does not allow the SCJ to automatically acquit and discharge an accused person. If such a stand is taken, it would be a backdoor method to discontinue a prosecution.

[28] A FIR is purely a report that initiates a police investigation. It is a creature of the CPC where at s 107 it reads as follows:

> Section 107 Information of offences
>
> (1) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.
>
> (2) Every such information shall be entered in a book to be kept by that officer, who shall append to such entry the date and hour on which that information was given, and whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it.
>
> (3)(a) Notwithstanding subsection (1), information given by a person relating to the commission of an offence to a police officer, who at the time of receiving the information is not in a police station, shall be deemed to be received at a police station;
>
> (b) A police officer receiving such information under paragraph (a) where practicable shall record or cause to be recorded the name and address of the informant, the date and time of the receipt of such information, and shall convey such information to an officer in charge of a police station or any police officer whose duty is to receive such information;
>
> (c) Such information shall be reduced to writing and entered in a book in accordance with subsections (1) and (2) and shall subsequently be signed by the person who gave the information.
>
> (4) A police officer shall be duty bound to receive any information in relation to any offence committed anywhere in Malaysia.

[29] In *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 it was held as follows:

> Further, the information required need not contain the circumstances of the commission of the offence, nor the names of the offenders or the witnesses, for the main purpose of investigation is to ascertain those matters ... the first information report is not an encyclopedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only of the investigation stage that all the details can be gathered and filled up.

[30] After investigations commence, a finding would have been made based on the evidence obtained during investigation. The report therefore, becomes a mere notification of a particular complaint which may or may not result in any criminal offence. In the current case, after the said FIR was lodged, it resulted in the prosecution of the appellant. It would have been based on the complaint narrated by the complainant and the evidence that was obtained during the investigation. In short, what is within the investigation papers is only privy to the DPP and the police.

[31] A case does not make or break with the sole evidence of a complainant. In fact, a victim of crime may not even be the complainant of a FIR. This is because investigative results may come from many sources. It may emante from evidence gathered from witnesses, documents, as well as evidence obtained with the aid of technology such as CCTV recordings and electronic money trails.

[32] As such, it would be grossly simplistic to accept the submission by counsel that there was no longer any basis for a prosecution to proceed given that the complainant is no longer interested with the matter.

[33] At the lower court, the DPP made mention of a letter written by the complainant to the public prosecutor informing that she no longer wishes to pursue the matter. However, the DPP did not present to the court the response of the public prosecutor on the day the trial was fixed. Instead, the DPP proceeded to call the complainant to the stand. This raises the question of whether the public prosecutor had agreed to the application to withdraw the report. The charge was after all, a serious charge with the accused potentially facing a maximum imprisonment term of fourteen years and shall also be liable to whipping.

[34] The SCJ was right in acknowledging the powers of the public prosecutor under art 145(3) of the Federal Constitution. She was also conscious of the guidance in *Public Prosecutor v Lew Koy* [2001] 4 MLJ 655; [2002] 1 CLJ 86 and *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100; [1986] CLJ Rep 232. This resulted in the SCJ to order the order of DNAA. The SCJ did not err in so doing.

Leaving it to the court's discretion

[35] What can be gleaned from the notes of evidence is the action of the DPP in leaving the matter to the court's discretion (*serah pada budi bicara mahkamah*) after the complainant informed the court that she no longer intends to proceed with the matter.

[36] This court is of the considered view that in the scenario where there was no express application by the DPP to seek a discharge of the accused, the court was not wrong in deciding to order a DNAA. The court cannot be dictated by the whims and fancies of a complainant. The court too is not obliged to order an outcome that the appellant desires.

[37] In the case of *Public Prosecutor v Azril Nurrasyid b Mohamed Jomali* [2009] MLJU 1298, a scenario almost similar to the current case before this court, it was held that the complainant and the accused cannot dictate the outcome of the matter by simply saying that there is a request to withdraw the police report. This court fully supports this contention.

Charge hanging in perpetuity

[38] As to whether the charge will be hanging over the accused, it is the firm view of this court that this is solely within the discretion and wisdom of the public prosecutor. While it is acknowledged that in general, there is no limitation period in instituting a criminal case, it is also acknowledged that the longer a case is kept before an accused is prosecuted, the greater are the chances of the case weakening. Recollection of witnesses will fade, locating witnesses will require greater effort as time goes by. It is for these obvious reasons that this court is of the considered view that it will not play a role in so deciding this issue as the matter is solely within the realm of the public prosecutor's discretion.

CONCLUSION

[39] From the records of proceedings, this court finds that the action of the DPP in putting the complainant as the first witness only to be informed by the complainant that she does not wish to pursue the matter any further is an action that was calculated to let the court determine the outcome of the case.

[40] The DPP is clothed will all powers of the public prosecutor (s 376(3) of the CPC). If he had intended that the matter be discontinued, he should have at the onset, indicated and informed the court the prosecution's stand. However, the records did not show any positive indication by the DPP towards achieving this outcome.

[41] If the order by the SCJ was one of AND, it would effectively mean that the court had discontinued the proceedings. This was the intended outcome sought by the accused person/appellant. The complainant will also achieve her goal of not wanting to pursue the matter for reasons best known to her. It could have been motivated by many reasons. It was convenient to say the least, to adopt this approach. However, this would mean the public interest element which the public prosecutor is guardian of, may be rendered nugatory.

[42] Based on the foregoing reasons, this court is of the considered view that the magistrate did not err in making an order of DNAA. It was done within the confines of the law and more so in the situation that the court was confronted with.

[43] In passing, this court wishes to mention that DPPs should refrain where possible the use of the phrase of 'leaving it to court' when the power to apply and seek the appropriate order is within the domain of the DPP. It behooves the DPP to state clearly the stand he or she wishes to take. This will greatly assist the court in making a final decision.

Note: This appeal was heard by this court on 16 May 2018. However, due to an administrative oversight on the part of the registry, the notice of appeal by the respondent was only brought to the attention of this court on 12 December 2018.

Appeal dismissed and order of sessions court judge affirmed.

Reported by Mohd Kamarul Anwar